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No. 67

In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS BRUNO

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The District Court did not file an opinion. The opinion of the Circuit Court of Appeals (R. 71–74) has been reported in 153 F. 2d 843.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on February 15, 1946 (R. 75). The petition for a writ of certiorari was filed on March 23, 1946, and was granted on May 13, 1946 (R. 76). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 25, 1925.

QUESTIONS PRESENTED

1. Whether a jury can find a seller of a commodity under price control guilty of a criminal violation where he wilfully sells at an over-ceiling price by falsely describing the commodity's grade, if the purchaser has a right to inspect shipments and reject any that are upgraded or by consent of the seller pay for them on the basis of their true grade.

2. Whether there was a custom in the trade for sellers to invoice goods at grades higher than those actually shipped.

3. Whether, if so, such a custom constitutes a defense when the custom itself is in violation of the Emergency Price Control Act.

4. Whether respondent repaid the amounts overcharged on all of the shipments covered by the information.

5. Whether, if so, such payment constitutes a defense.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are the Emergency Price Control Act of 1942 and Maximum Price Regulation 30. The pertinent provisions thereof are set forth in the Appendix, *infra*, pp. 23–26.

STATEMENT

A criminal information was brought against respondent Louis Bruno, for having wilfully sold

waste paper at prices higher than the ceilings established by Maximum Price Regulation 30. Five separate sales of a carload each were the basis for as many counts in the information (R. 2–4). The jury found respondent guilty on all five counts. He was sentenced to six months' imprisonment and a fine of $500 (R. 1). The judgment of conviction was reversed by the Circuit Court of Appeals (R. 75), to which court this Court has issued a writ of certiorari (R. 76).

Respondent sold waste paper to one Carrano, who resold it, respondent shipping the paper directly to Carrano's customers (R. 5–6). Although called a broker, Carrano was actually an independent dealer, who bought the paper from respondent and paid for it (R. 5). In each transaction upon which this information was based, Carrano ordered #1 Assorted Kraft Paper from respondent. Respondent invoiced the shipments as such, and charged $1.75 per hundredweight, the ceiling price therefor (R. 5–9, 41–42, 49–50). Pursuant to Carrano's directions, two carloads were sent to the Ohio Boxboard Company and three to the Taggart Corporation (R. 6–8). Carrano paid respondent the invoice price (R. 6–9, 44–45, 54–55). However, inspection at the mills revealed that each shipment was composed almost entirely of corrugated paper, the ceiling price of which is $1.15 per hundredweight

(R. 18, 26–27). The first car contained 27,984 pounds of inferior paper out of 34,719 pounds shipped (R. 17–18, 31). On the second car, 24,040 pounds were upgraded, and only 485 pounds were Assorted Kraft[1] the correct grade (R. 18, 30, 32, 42). None was a superior grade (R. 18, 19). The third car was composed entirely of inferior paper, as were the fourth and fifth (R. 22, 26, 27, 29).

In two cases, the mills made no complaint about the upgrading and respondent retained the overcharges (R. 27, 28). In three cases, after the Office of Price Administration had begun an investigation, the mills paid Carrano only for the quality received; as a result debits were charged by Carrano to Bruno (R. 11–13). In one sale[2] the debit was $187.44, leaving a correct price, according to the debit memo, of $448.15 (R. 68); in another[3] the debit was $159.10, the correct price $302.06 (R. 68–69); and in a third[4] the debit was

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[1] The Court below, in footnote 4 of its opinion (R. 74), erroneously stated that an undercharge was made for this small item. This was based on the debit memo from Carrano to Bruno (R. 68–69) and Bruno's statement (R. 42). But the mill which actually inspected the paper found that it was only Assorted Kraft Paper as invoiced, and paid for it at $1.75 per hundredweight (R. 18, 19).

[2] Count 1 of the information.

[3] Count 2 of the information.

[4] Count 5 of the information.

$270.69, the correct price $541.38 (R. 8, 69). Roughly, then, there was an overcharge of from 40% to 50% on these three shipments where debits were made. On the two shipments[5] as to which the respondent kept the full invoice price, the overcharge was approximately 50%.

Respondent admitted that he frequently shipped inferior paper, and billed it as Assorted Kraft Paper (R. 41–44).[6] There was testimony that the mills customarily inspected their receipts of wastepaper, and that if the paper was below the grade at which it had been invoiced, the mills would notify Carrano, who, in turn, would communicate with respondent (R. 10–11). If the latter agreed, Carrano would allow the mill to keep the merchandise and pay him the correct price (R. 11). Carrano, in turn, would debit respondent for the difference between the correct price and that already paid by him (R. 42–44).

Carrano testified that he had no arrangement with respondent whereby the latter could bill merchandise as Assorted Kraft but ship inferior grades (R. 55; cf. R. 10–12). The accountant for

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[5] Counts 3 and 4 of the information.

[6] Respondent admitted that he did not do this because the paper was mixed in his warehouse (the different types were baled separately), but merely because he threw in inferior paper when he didn't have enough Assorted Kraft for an order (R. 42–43).

the Taggart Corporation who, upon notification from his company's plant of shipments received, paid its bills, testified that he had received no previous reports that corrugated paper was shipped instead of Assorted Kraft (R. 26), despite respondent's statement that he often did this (R. 42–44). Respondent testified that the arrangement made was that he receive only the ceiling price (R. 41, 43–44). However, no repayment of the excess was made in two of the five sales involved (R. 27, 28). The government proved that the repayments of the overcharge to Carrano in the other three cases promptly followed an OPA investigation,[7] and offered to prove that these were the only ones ever made during the long course of dealings between Carrano and Bruno (R. 15–16, 26). Respondent admitted that he knew Carrano wanted Assorted Kraft when he made such orders (R. 48), and that on at least two occasions when he shipped different grades of paper he listed them separately (R. 51).

Bruno billed Carrano at prices appropriate for Assorted Kraft Paper, but he entered much lower figures in his ledger. The first sale was invoiced at $635.59 but entered as $476.69, and similar entries were made for the other sales (R. 33). The lower figures were far closer than the invoice

[7] The investigation started on April 5, 1944 (R. 32, 29). The three debit memos from Carrano to Bruno were made on April 10, April 13, and August 10, 1944, respectively.

prices to the correct ceiling prices.[5] No record of any debit whatsoever for upgraded material was made in the books kept by the firm (R. 34, 58).

The jury convicted on all five counts (R. 1). The Circuit Court of Appeals overturned the jury's verdict and held that no criminal violation had been established, on the theory that there was an industry practice whereby the buyer reserved the right to regrade the shipment on delivery, that such regrading was done in connection with the sales involved in this case, that refunds were made, and that it was customary for the seller to ship and bill without regard for the lower quality of the merchandise (R. 71–74).

SPECIFICATION OF ERRORS TO BE URGED

In a prosecution for wilfully selling wastepaper at overceiling prices in violation of Maximum Price Regulation 30 by means of a false description of the grade of paper—

1. The court below erred in holding that the purchaser's right to check the shipments for quality (and either reject any that were upgraded or,

[5] Respondent explained these large discrepancies by declaring that he had an arrangement with his brother (whose wife owned the firm) which allowed him these differences as his commission (R. 45). If these concealed amounts were commissions, they amounted to roughly $10.00 per ton on these five sales. Respondent stated that the firm sold from 300 to 500 tons of paper weekly (R. 38). This would mean that while his salary was $20 per week (R. 38), his commissions would range from $3,000 to $5,000 weekly or about one-fourth of the gross sales made!

by consent of the seller, pay for them on the basis of their true grade) was a complete defense to the prosecution.

2 (a). The court below erred in determining that there was a custom in the trade for sellers to invoice goods at grades higher than those actually shipped.

(b). The court below erred, if such a trade custom were established, in holding that it constituted a defense to this prosecution and in failing to hold that the custom was itself a violation of the Act and the Regulation.

3 (a). The court below erred in determining that respondent had repaid the amounts overcharged on all of the shipments covered by the information.

(b). The court below erred in concluding that such repayment constituted a defense.

4. The court below erred in finding that there was insufficient evidence to support the jury's verdict.

SUMMARY OF ARGUMENT

Respondent was convicted of having wilfully sold waste paper at overceiling prices through the device of upgrading, *i. e.*, shipping low grade paper, and invoicing and receiving payment for it at the ceiling prices applicable to higher grades. The Circuit Court of Appeals reversed his conviction, basing its decision on the assumption that one or more of the following practices constituted defenses to the prosecution: (1) the alleged cus-

tom in the trade for the buyer to check the paper on delivery and reject any that was upgraded or negotiate a new agreement with the seller at the lawful ceiling price; (2) the alleged custom of shippers to invoice paper at a high grade but to ship whatever they had on hand even though the grade was lower than the invoice grade; (3) the alleged refunds by respondent of the overcharges on all of the sales involved.

(1) The custom of the buyers to inspect and reject upgraded shipments represents no more than the universal practice of buyers to inspect what they receive and to refuse to pay for something they do not receive. A sale at an overceiling price is not to be regarded as one at the lawful maximum merely because there is the possibility of a subsequent adjustment by the seller.

(2) There is nothing in the record to support the statement of the court below that there was a custom in the trade for shippers to fill cars with whatever merchandise they had regardless of the grade which was ordered and invoiced. In any event, the applicable regulation specifically requires that waste paper be invoiced according to the proper grades; hence any such custom would be expressly forbidden by the regulation and could scarcely be relied upon as a defense.

(3) Once an overceiling sale has been made, a refund of the overcharge constitutes no defense. Furthermore, the record is clear that as to two of

the five sales involved, no refund was ever made. The sentence imposed on defendant did not exceed that allowable for either of those two counts alone. Hence, even on the theory of the court below, the conviction should have been affirmed.

ARGUMENT

THE RECORD SUPPORTS THE JURY FINDING THAT RESPONDENT WILFULLY MADE SALES OF WASTEPAPER AT PRICES HIGHER THAN THE MAXIMUM PRICES PERMITTED BY MAXIMUM PRICE REGULATION 30

Respondent invoiced, delivered, and received payment for paper at a price higher than the ceiling applicable to the grade delivered. As the court below conceded, this, without more, would make defendant's transactions overceiling sales (R. 72). It apparently thought, however, that no overceiling sales occurred because of: (a) the alleged custom in the trade for the buyer to check on delivery, and, when he found the merchandise to be below the invoice grade, either to reject the upgraded merchandise or to negotiate a new arrangement with the "broker" in which the paper would be priced on the basis of the ceiling for the true grade and the "broker" would debit the account of the shipper accordingly; (b) the alleged custom of shippers in the industry to load the freight cars with whatever grades they had, regardless of the grade ordered and invoiced; and (c) the alleged refunds on all the sales (R. 72–73).

It is submitted, however, that none of these grounds affords respondent any defense or in any

respect deprives his sales of their overceiling character. The question whether the prices charged were intended not to be final but to be subject to adjustment was submitted by the trial court to the jury" (R. 66–67). There was ample evidence to support the jury's verdict, as appears both from the Statement and the discussion *infra*.

"* * * In order that there may be a crime here, there must have been an intent on the part of this defendant to commit that crime, which was to receive a price for the paper which he sold which was in excess of the ceiling price. Now, if actually there had been paid to him more than the ceiling price, but it was the intent and intention of all persons respecting it, not to accept * * * that as the final price necessarily, but to accept it subject to adjustment which would be made upon the examination of the paper actually delivered and the establishment of the price set by law for that paper, that is, if they had the idea that the only price to be received was that which the law set for the paper actually delivered, and that actually was what was paid, then there was no intent on his part to break the law. But if he sold this paper to the dealer, the wholesale dealer for a price which was above the ceiling price, and that was the price that he intended to get, and if you find as a fact that the only reason he didn't get it was because he didn't get away with it and there was a discovery without his having intent to do the honest, decent thing, and that was the only reason he didn't get it, still he would have had an intent to commit the crime and would have effectively committed it when he received above-ceiling price which he intended to receive, if he did so intend, and if the only reason that he didn't get the ceiling price was because he was found out.

"In other words, there must be, before you can find him guilty, there must have been in his mind an intention not to set a price and then have it adjusted * * * afterwards according to the truth of the situation, but an intent

(A) *The alleged industry custom of the buyers to inspect and to accept, reject, or renegotiate.*— To the extent that the record shows an industry practice whereby the purchaser inspected the goods and checked the grade on delivery, this represents no more than the custom of any buyer of merchandise to examine his goods on receipt to verify that the seller has delivered what he ordered. And the right to reject any goods that do not conform to his order is a right which a purchaser always has in the absence of specific agreement to the contrary. The right is no different from that exercised by any housewife who refuses to accept goods delivered by a department store which are wholly different in type from those ordered. Nor is this situation any different from that in which the weight of goods sent is short and the purchaser is unwilling to pay more than the proper price for the quantity actually sent. The purchaser and seller always have the right

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to commit the crime, the formation of a purpose in his mind when he did this thing, to get more money for that paper than the ceiling price established by law.

"I hope you understand what I mean, because there has been in the defense set up the thought that he did charge the price which was set for something which actually was not delivered, but that the terms of the contract were that if there was any variation, there would then be a revision; and he says that he shipped with that intention, and that he didn't actually himself know what was shipped, but gave orders to his people to deliver what was ordered. Now, you just delve into that from the evidence and consider only the evidence brought out at this trial, and arrive at your determination. * * *"

to agree to a new contract, under which the goods would be retained and only the proper price for what was actually sent paid. Thus, if there was an industry understanding authorizing this practice of acceptance, rejection or renegotiation, it constituted no more than a reflection of the legal rights which all of the parties possessed without any such understanding, and did not alter the nature of the transaction for purposes of the Price Control Act. If an industry understanding, conferring the same rights upon the purchaser as he would have had under the law of sales and without regard to the understanding, can exempt the seller from liability for overceiling sales, such an understanding would be a valid defense in every case where goods are invoiced at prices above the ceiling price.

Thus it cannot be contended that this right of the purchaser (whether based upon an expressly recognized industry custom or upon the privilege possessed by all buyers under the law of sales) implies that all sales of any merchandise *at a specified price* are to be regarded as sales not at that price but at some price which may be determined in the future, depending on the buyer's inspection. The sale is a sale at the initially agreed price, notwithstanding any subsequent adjustment by the seller.[16] This has been held to be

[16] Under the Emergency Price Control Act, "sale" includes "sales, dispositions, exchanges • • • and contracts and offers to do any of the foregoing." (Section 302 (a).)

Even under the common law definition of "sale", title

true even where no overceiling payment by the buyer has preceded a voluntary adjustment. *Porter* v. *Crawford & Doherty Foundry Co.*, 154 F. 2d 431 (C. C. A. 9), petition for certiorari pending, No. 161, this Term.

Even if the buyer had the right to pay on the basis of the actual grade shipped without either any further negotiations or the consent to payment of the lower price by the shipper, the sale would nevertheless have been at an overceiling price. In *United States* v. *Seidmon*, 154 F. 2d 228 (C. C. A. 7), a shipper was held guilty of criminal contempt of an injunction forbidding him from selling, delivering, or offering for sale, scrap iron at overceiling prices, where the evidence showed that he had shipped scrap invoiced at the ceiling for a higher grade. This was held despite the fact that there was a custom in the trade authorizing the purchaser to regrade the shipments and pay only the price for the grades actually

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passed when the paper was shipped. See the terms of Carrano's purchase order (R. 70), indicating a "purchase" at the time of shipment "subject to mill or consignee's report as to weight, quality, excess freights, etc." Cf. *Delaware, Lackawanna & Western Railroad Co.* v. *United States*, 231 U. S. 363, 371–373. See also Uniform Sales Act, Sec. 19; *Standard Casing Co.* v. *California Casing Co.*, 233 N. Y. 413, 416, *Atlas Shoe Co.* v. *Lewis*, 202 N. Y. App. Div. 244, 248. Hence the argument can scarcely be made that a completed sale had not taken place until all final adjustments in price had been made and that therefore all final adjustments had to be taken into account to determine whether there was in fact an overceiling sale. Cf. *Leonard* v. *Davis*, 1 Black 476, 482–483; *Boswell* v. *Green*, 25 N. J. L. 390, 397–399.

shipped, without the consent of the shipper, and despite the fact that, as to the particular violations complained of, the purchaser had exercised this right and the defendant had never received more than the ceiling price. The case at bar is a far stronger one, for (1) there was no arrangement here whereby the purchaser could scale down the prices to ceiling level without the consent of the seller (R. 11), and also because (2) overceiling prices had already been paid by Carranto to Bruno (R. 6–9, 44–45, 54–55).

In agreement with the *Seidmon* case above are the remarks of Judge Koscinski in *Bowles* v. *Soverinsky*, 65 F. Supp. 808 (E. D. Mich.), in which injunctive relief was sought on the basis of upgrading in the sale of waste rags in violation of Maximum Price Regulation 47 (8 F. R. 270): "Defendants attempt to avoid the injunctive relief requested by plaintiff by reliance on a claimed custom of the industry to the effect that all shipments are sold 'subject to mill-grading' and that their action in this case was but an offer to sell the goods as of whatever grades the mill declared them to be. None the less, this procedure is a patent evasion of the unmistakable provisions of the regulation. Scarcity of waste materials has a tendency to encourage the kind of dealings here complained of and it is easily conceivable that a consumer would be willing to pay the up-graded price rather than close down his mill for a lack of those materials" (65 F. Supp. at 812).

Indeed, we know of no case in agreement with the reasoning of the court below. The issue has rarely been specifically discussed, though the buyers' custom referred to by the court below has been asserted in many of the enforcement suits which have been brought against upgrading. Courts have thus far been unwilling to determine that upgrading—a favored device of the black market—may be used with impunity wherever buyers in the industry customarily check the grade of the goods delivered, and either reject upgraded shipments or receive price adjustments on them. Such a determination would give a legal green light to upgrading. Few sellers would hesitate to take advantage of a situation where they have all to gain and nothing to lose. The minimum the upgrading seller would retain in all cases would be the legal maximum price, and, in many cases, he would get more; in a seller's market, buyers certainly will not always reject upgraded shipments or insist upon price adjustments.

It should be emphasized, finally, that, as hitherto indicated, the sales were not made at an "open" price—to be determined in the future, depending on the buyer's inspection of the grade. On the contrary, they were made at specific invoice prices which were concededly above the ceiling, and the goods were delivered at those prices. Nor did the buyer have a right, either by contract or custom (R. 73, 11), to decrease this

specified price, without the seller's consent, to the ceiling price for the grade actually delivered. Respondent's clear violations of the prohibitions of the Regulation against sale or delivery at overceiling prices were unaffected by an industry custom under which buyers exercised their normal right to inspect the goods bought and reject them as below the quality contracted for, or keep them if the seller agreed to a different price for the different quality.

(B) *The alleged custom of the shippers to ship whatever grade they had on hand regardless of the grade ordered and invoiced.*—The court below stated that there was "testimony that in times like the present, with paper very scarce, the shipper would customarily fill up the car with whatever he had, on the assumption, as proved by experience, that the factories were very glad to have any kind of paper they could get" (R. 73).

There is nothing in the record which supports this statement, with the problematical exception of the defendant's testimony that he upgraded his cars (R. 42, 43, 44); even if assumed to be true, this would not show a practice for the rest of the industry. Testimony that the purchasing mills had a practice of inspecting and rejecting upgraded merchandise is not, of course, equivalent to testimony that shippers customarily shipped upgraded paper. The existence of any such practice of upgrading is contradicted by the only pertinent evidence in the record, Carrano's testimony that he had no arrangement with respondent

whereby the latter could bill merchandise as Assorted Kraft but ship inferior grades (R. 55). Furthermore, the "broker" customarily specified particular grades in his order (R. 9), a meaningless gesture if he expected random loading; and Bruno admittedly knew that Carrano wanted what he specified (R. 48).

Even if there were an industry practice of loading low grade paper and invoicing for a higher grade, it would constitute no defense, for such false grading in the invoice would have been in direct violation of the clear mandate of the regulation, which requires correct invoicing and sales and deliveries at no more than ceiling prices. See Sec. 1347.14 (f) and Sec. 1347.1 (a) of Maximum Price Regulation No. 30, *infra*, pp. 25–26, 24." Certainly respondent could gain no comfort from a custom which in itself was unlawful. If that were not so an industry in which blackmarketing were sufficiently prevalent would by reason of that fact alone be immune from prosecution—an obviously absurd result.

(C) *The alleged refunds on all the sales.*—The opinion below was predicated upon the assumption that all over-payments were adjusted (after the commencement of the OPA investigation),

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[11] The provisions of this regulation require that the sales of waste paper be properly invoiced and the invoices kept on file. Sections 4 (a) and 205 (b) of the Act make it unlawful for anyone to make false statements in any document required to be kept or filed.

with the result that respondent ultimately received no more than the ceiling price (R. 73–74). This was both incorrect and immaterial.

1. *Refunds were not made on two of the five violative sales.*—The refund or "debit" was made only as to three of the five carloads involved. No refund was ever requested or obtained in connection with the other two carloads. The accountant for the Taggart Corporation testified with respect to the three shipments received by that company (R. 27):

> Q. With respect to three shipments, your attention has been called to, there was only one shipment where a debit was engaged in?—A. Yes.
>
> Q. And the other two were paid in full?—A. Right.
>
> Q. And no adjustment has ever been made on them?—A. No.

(See also R. 28.) And the respondent testified that he made adjustments only when the mills reported the upgrading to Carrano for adjustment and the latter passed the report on to the respondent (R. 42). While the respondent testified generally that adjustments were made in all cases of upgrading (R. 44, 45), he could not show from his accounts or any exhibits that such refunds had ever been made; his recollection on the subject was quite vague (R. 45–47). Indeed, counsel for the respondent, in his motion for a directed verdict, in effect conceded that there was no evidence of a

refund with respect to two of the shipments to the Taggart Corporation (R. 61). In this state of the evidence the court below was not justified in holding that the evidence was clear that the ultimate price paid was not more than the ceiling;[12] the point was submitted to the jury and there was ample evidence to support its verdict to the contrary."[13]

Thus, even on the theory of the court below, these two sales were unlawful. More than the ceiling price was paid and no portion of the excess was ever paid back to the purchaser. In other words, even if all of the Government's arguments up to this point are incorrect, nevertheless, as to two of the five counts of the information, it was

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[12] The court below must have overlooked the above-quoted testimony when it stated (R. 73): "Both the representatives of the consignees who have testified and Carrano, the broker, were clear and explicit in their statements that the ultimate price paid was not more than ceiling." Although Carrano first stated generally that adjustments were made after mill inspection (R. 10–12), he only identified three "debit memos" covering three of the carloads involved in this case (R. 11). When Carrano was recalled to the witness stand and his attention specifically directed to the other two carloads, he admitted that in the absence of his records (which he had been requested to bring to court (R. 56)) he could not answer as to whether adjustments had been made (R. 56–57). The court below apparently also overlooked the latter portion of Carrano's testimony.

[13] The jury was instructed (R. 62) that if the respondent "did not sell it with intent of receiving higher than ceiling price, and *did not actually receive higher than ceiling price*, there could be no conviction". (Italics supplied). As to instances where debits were made the jury was told to pass on the Government's contention that this "was just an afterthought" (R. 62).

clearly error for the court below to reverse the conviction. Since the sentence imposed on respondent (R. 1) was not in excess of that allowable for either of these two counts,[14] then, even on the reasoning of the court below, the conviction and sentence should have been affirmed. *Whitfield* v. *Ohio*, 297 U. S. 431, 438; *Brooks* v. *United States*, 267 U. S. 432, 441; *Abrams* v. *United States*, 250 U. S. 616, 619; *Evans* v. *United States*, 153 U. S. 584, 595; *Claassen* v. *United States*, 142 U. S. 140, 146.

2. *Refunds would not be a defense to the violation.*—Once an overceiling sale has been consummated, especially where, as in the instant case, payment has been made as well, the seller has no *locus poenitentiae* in which to purge himself of his violation by refunding the excessive portion of the purchase price, any more than one guilty of larceny can escape punishment by returning the property he has stolen. *Gilbert* v. *Thierry*, 58 F. Supp. 235 (D. Mass.), affirmed, 147 F. 2d 603 (C. C. A. 1); *Bowles* v. *Leventhal*, 61 F. Supp. 144 (S. D. N. Y.); *Bowles* v. *Lehigh Valley Coal Sales Co.* (S. D. N. Y.), 4 OPA Op. & Dec. 2185; *Trachtman* v. *Samit*, 62 F. Supp. 176 (E. D. Pa.); *Zwang* v. *A & P Stores*, 181 Misc. 376, 46 N. Y. S. 2d 747; *United States* v. *Summerford* (D. Hawaii), 1 OPA Op & Dec. 1247. Thus, even if the court below had been correct in stating that the evidence

[14] See Sec. 205 (b) of the Act, Appendix, *infra*, pp. 23–24.

was "clear and explicit * * * that the ultimate price paid was no more than the ceiling," that fact would not have constituted a defense to the prosecution.

CONCLUSION

The judgment of the court below was erroneous; it should be reversed, and the judgment and sentence of the district court reinstated.

Respectfully submitted.

J. HOWARD MCGRATH,
Solicitor General.
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APPENDIX

The pertinent provisions of the Emergency Price Control Act, 56 Stat. 23, 50 U. S. C. App., Supp. V, 901, *et seq.*, are as follows:

SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

* * * * *

SEC. 205 (b). Any person who willfully violates any provision of section 4 of this Act, and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202, shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punish-

ment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought.

* * * * *

SEC. 302. As used in this Act—

(a) The term "sale" includes sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do any of the foregoing. The terms "sell," "selling," "seller," "buy," and "buyer," shall be construed accordingly.

The pertinent provisions of Maximum Price Regulation No. 30, which establishes maximum prices for wastepaper, as it existed at the time of the transactions involved (7 F. R. 9732, 8 F. R. 13049, 8 F. R. 17483) are as follows:

§ 1347.1 PROHIBITIONS.—Regardless of any contract, agreement, lease or other obligation:

(a) No person shall sell or deliver any wastepaper at higher prices than the maximum prices set forth in Appendix A (§ 1347.14) of this Maximum Price Regulation No. 30.

(b) No person shall buy or receive any wastepaper at higher prices than the maximum prices set forth in Appendix A (§ 1347.14) of this Maximum Price Regulation No. 30.

(c) No person shall agree, offer, solicit, or attempt to do any of the foregoing.

* * * * *

§ 1347.8 EVASION.—The price limitations set forth in this Maximum Price Regulation No. 30 shall not be evaded, whether by direct or indirect methods, in connection with any offer, solicitation,

agreement, sale, delivery, purchase or receipt of wastepaper, alone or in conjunction with or relating to any other commodity or by way of commission, service, transportation, or other charge, or discount, premium or other privilege or tying agreement, or other trade understanding or otherwise.

§ 1347.9 ENFORCEMENT.—(a) Persons violating any provision of this Maximum Price Regulation No. 30 are subject to the criminal penalties, civil enforcement actions, license suspension proceedings, and suits for treble damages provided for by the Emergency Price Control Act of 1942 as amended.

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§ 1347.11 (b). Unless the context otherwise requires, the definitions set forth in section 302 of the Emergency Price Control Act of 1942 shall apply to other terms[1] used herein.

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§ 1347.14 APPENDIX A: MAXIMUM PRICES FOR WASTEPAPER. * * *

(f) *Invoice requirements.*—All sales of wastepaper commercially packed shall be invoiced. When delivery of the wastepaper is out of seller's warehouse, the invoice shall accompany the delivery or be mailed to purchaser before the end of the business day following the day upon which the wastepaper is shipped. In all other cases, the invoice shall be mailed before the end of the business day following the day upon which the wastepaper is shipped except that in those cases where seller does not receive

[1] The terms specifically defined in paragraph (a) of this section are not here pertinent.

the description of the wastepaper from his own supplier within that time, he shall send the invoice to purchaser as soon as he does receive that description. A copy of such invoice shall be kept on file by the seller, and the original shall be kept on file by the purchaser. The invoice shall state as separate items the following data:

(1) *The grade name.*—This shall be (i) the applicable grade name set forth in paragraph (a) of this § 1347.14, or (ii) the grade name of a specialty with respect to which sworn statements and samples have been submitted to the Office of Price Administration in accordance with paragraph (c) of this § 1347.14.

(2) *The origin of the shipment.*—This shall include the name of the city or town where the point of shipment is located. If delivery is in the seller's own truck, and if the point of shipment and the buyer's premises are located at a distance of more than ten but less than fifteen miles from each other by the shortest available highway route, the street address and city where such point of shipment is located shall be shown.

(3) *The destination of the shipment.*—This shall include the name, street address and city of the consumer.

(4) Any amount charged by the seller for transportation of the wastepaper.

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